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U.S. Citizenship and Immigration Services

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[redacted]

File: SRC-02-234-52175 Office: TEXAS SERVICE CENTER Date: FEB 23 2005

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its Chief Executive Officer / Vice President as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that operates as an importer and exporter between the United States and China. The petitioner claims that it is the subsidiary of [redacted] located in Tianjin, China. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The petitioner filed the petition on July 30, 2002. On December 4, 2002, the director denied the petition, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. On January 2, 2003, the petitioner filed a motion to reopen and reconsider. On November 26, 2003, the director dismissed the motion to reopen and reconsider, concluding that the petitioner did not overcome the original grounds for denial.

On December 29, 2003, the petitioner filed the present appeal. On appeal, counsel for the petitioner asserts that the petitioner has submitted sufficient evidence to show that the beneficiary will be employed in an executive capacity. Counsel further asserts that the director failed to fully consider a list of previously alleged facts, and misstated one of the petitioner's prior arguments. Counsel states that the director applied an erroneous legal standard by considering the petitioner's gross revenue as a negative factor. In support of these assertions, the petitioner submits a statement on Form I-290B with an addendum, as well as previously submitted evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the denial of December 4, 2002, the director stated the following:

> Review of the evidence shows the petitioner is an import/export business that employs only two people and has a gross annual income of less than $250,000.
>
> The petitioner has not demonstrated the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization. The petitioner has not established the beneficiary will be involved in the supervision and control of the work of other supervisory, professional or managerial employees who will relieve him from performing the services of the business. Therefore, the beneficiary cannot be said to be engaged in primarily executive duties a preponderance of the time as the business has not expanded to the point where the services of a full-time, bona fide Chief Executive Officer/Vice President would be required. The majority of his work time would be spent in the nonexecutive, day-to-day operations of the business.

In response to the petitioner's motion to reopen and reconsider, the director provided a thorough explanation of the proper consideration of a petitioner's staff size in the context of an L-1A adjudication. The director noted that "it is simply a fact in the business world that the greater the size of a corporation, the greater the extent of the traditional layering of employees." The director confirmed that "[i]t assuredly is not true that a

lack of size in and of itself 'disqualifies the U.S. company from sponsoring an employee for an extension.' All attributes of a petitioning business are taken into account prior to rendering a decision." The director indicated that the petitioner erroneously stated that "an alien qualifies as a manager or executive if the employee or employees he or she supervises are professionals." The director correctly provided that "the beneficiary's position cannot be considered largely and inherently executive in nature simply because he oversees an employee who is a doctor and pharmacist." The director discussed the petitioner's argument that the facts of the present matter are analogous to those in an unpublished AAO decision involving an employee of the Irish Dairy Board. The director distinguished the two matters by stating that "[the Irish Dairy Board] was far more active in [its] business than the petitioner." The director addressed the petitioner's claim that the beneficiary supervises two sales representatives on a contract basis, and that the beneficiary has supervisory authorities over the employees of a warehousing company pursuant to a contractual agreement. The director correctly highlighted that the contracts submitted by the petitioner as evidence of these supervisory relationships were executed after the date of filing the petition, thus the beneficiary's claimed supervisory authority over outside contractors cannot be considered for the purposes of this adjudication. The director concluded by responding to the petitioner's statement that it "is basically a new company and it takes time for a new company to grow and to prosper." The director noted that the petitioner has been given one year to expand, yet has failed "to establish that the beneficiary is currently engaging in truly executive duties a majority of the time."

On appeal, counsel for the petitioner states that:

> Our reason for this appeal is that the Texas Service Center fails to fully consider the following factors: 1) There are no statutory restrictions on small companies; 2) The beneficiary is a functional manager; 3) The beneficiary supervises professionals; 4) The beneficiary supervises independent contractors; 5) The beneficiary uses and supervises business partner's staff; 6) There is a precedent that even [a] sole company employee may qualify.

Counsel suggests that the director misstated one of the petitioner's prior arguments regarding the legal significance of a beneficiary's supervisory authority over professionals. Counsel claims that the petitioner asserted that the beneficiary's supervision of professionals is "one of, not the only, reason and justification for the L-1A classification as a manager and executive." Counsel repeatedly refers to an unpublished AAO decision involving an employee of the Irish Dairy Board as a "precedent decision," and asserts that the relevant facts are analogous to the present matter, rendering the beneficiary a functional manager. Counsel takes issue with the director's statement that the petitioner is dissimilar from the Irish Dairy Board due to having a lower sales volume.

Upon review, counsel's assertions are not persuasive. With one exception, counsel fails to sufficiently address the director's grounds for denial as stated in the decisions denying the petition and the motion to reopen and reconsider. Counsel's generalized statement that "the Texas Service Center fail[ed] to fully consider the [provided list of factors]" does not adequately address the director's denial or assert that the director's decision was based on any erroneous conclusion of law or statement of fact. Contrary to counsel's claim, the director clearly stated that a petitioner's size will not disqualify it from sponsoring a beneficiary for L-1A

classification. The director's decisions reflect that she appropriately considered the petitioner's size in light of all of the evidence submitted, and her decisions were not unduly based on the petitioner's small staff size. Counsel claims that the director failed to consider that the beneficiary supervises independent contractors, yet the director specifically addressed the petitioner's evidence on this point. The director correctly explained that the evidence was not probative of the petitioner's eligibility, as it reflects supervisory relationships that were created after the filing date. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). While counsel claims that the director failed to consider that the beneficiary supervises professionals, the director's denial specifically states that "[t]he petitioner has not established the beneficiary will be involved in the supervision and control of the work of other supervisory, professional or managerial employees who will relieve him from performing the services of the business." Thus, it is clear that the director examined this issue.

Counsel states that the referenced AAO decision involving an employee of the Irish Dairy Board is a "precedent decision," yet the AAO notes that it is unpublished. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Accordingly, the AAO decision involving an employee of the Irish Dairy Board is not binding precedent in this proceeding.

Counsel asserts that, in light of the Irish Dairy Board decision, the director failed to consider that the beneficiary is a function manager. The petitioner provided no further documentation or explanation to reflect that the beneficiary is a function manager. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. The director's decisions clearly reflect that she considered whether the beneficiary's duties will be primarily managerial. In concluding that the petitioner failed to establish that the beneficiary will be primarily engaged with managerial duties, the director likewise found that the beneficiary would not be a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel takes issue with the director's statement that the petitioner is dissimilar from the Irish Dairy Board due to having a lower sales volume. Counsel correctly states that "there is no statutory requirement for qualifying sales volumes." Upon review of the denial of the motion to reopen and reconsider, the AAO observes that the director's comments on this issue suggest that she considered the petitioner's sales volume to be a negative factor. Yet, in light of the numerous other issues the director addressed, it is evident that she did not deem the petitioner barred from eligibility based on a low sales volume. The record reflects that the director appropriately considered the petitioner's sales volume as one factor that sheds light on the beneficiary's actual duties. Further, as discussed above, the unpublished AAO decision involving an employee of the Irish Dairy Board is not binding precedent. The director's comment regarding the petitioner's sales volume was made in the course of distinguishing the facts of the present petition with those of the referenced matter. The director need not have made such a distinction.

Finally, counsel suggests that the director misstated one of the petitioner's prior arguments regarding the legal significance of a beneficiary's supervisory authority over professionals. Counsel claims that the petitioner asserted that the beneficiary's supervision of professionals is "one of, not the only, reason and justification for the L-1A classification as a manager and executive." However, in the motion to reopen and reconsider, counsel stated that "an alien qualifies as a manager or executive if the employee or employees he or she supervises are professionals." In the motion counsel provided no qualification of this statement. Thus, the director correctly presented counsel's assertion on this point, and appropriately noted that it is erroneous under current law.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not established that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the director's decision will be affirmed and the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has a qualifying corporate relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) requires the petitioner to submit "[e]vidence that the United States and foreign entities are still qualifying organizations." On the petition, the petitioner indicated that it is the subsidiary of the beneficiary's foreign employer. The petitioner has provided no documentation to establish that the foreign entity holds an ownership interest in it. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190 (Reg. Comm. 1972). Further, in the company brochure for the foreign entity, numerous subsidiary companies are listed, yet the petitioner is not among them. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.